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Protection One Alarm Monitoring, Inc.**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

RICHARD S. CLEMENS, an individual.

**Plaintiff,**

v.

**PROTECTION ONE ALARM  
MONITORING, INC., a corporation;  
and DOES 1-10, inclusive.**

## Defendants.

) CASE NO. 09 CV 1424 LCAB

The Hon. M. James Lorenz  
Courtroom 14

**DEFENDANT PROTECTION ONE  
ALARM MONITORING, INC.'S  
NOTICE OF MOTION AND  
MOTION TO DISMISS  
PLAINTIFF'S FIRST AMENDED  
COMPLAINT; MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT THEREOF;  
DECLARATION OF STEVEN G.  
GATLEY**

} F.R.C.P. 12(b)(6) and 12(f)

{ Date: December 14, 2009  
Time: 10:30 a.m.  
Courtroom: 14

{ Action Filed: June 30, 2009  
Trial Date: TBD

TO THIS HONORABLE COURT, AND TO PLAINTIFF AND HIS COUNSEL OF RECORD:

PLEASE TAKE NOTICE that at 10:30 a.m. on December 14, 2009, or as soon thereafter as the matter may be heard in Department 14 of the United States District Court of the Southern District of California, located at the Edward J. Schwartz U.S.

1 Courthouse, 940 Front Street, San Diego, California 92101-8900, defendant  
 2 PROTECTION ONE ALARM MONITORING, INC. ("Protection One") will, and  
 3 hereby does, move this Court, pursuant to Federal Rules of Civil Procedure, Rule  
 4 12(b)(6), to dismiss plaintiff RICHARD S. CLEMENS' ("Clemens") **Second Claim**  
 5 **for Relief** as alleged in the First Amended Complaint ("FAC"), with prejudice and  
 6 without leave to amend, on the grounds that Plaintiff fails to state sufficient facts  
 7 upon which relief can be granted.

8 In addition, pursuant to FRCP Rules 12(b)(6) and 12(f), Protection One moves  
 9 for an Order striking all requests for exemplary and punitive damages from the FAC  
 10 which are specifically located at p. 6, ¶ 30, lines 26-27; p. 7, ¶ 36(b), line 21; p. 8,  
 11 line 5; and p. 8, lines 14-15.

12 This motion will be based on this notice of motion and motion, the attached  
 13 memorandum of points and authorities, the Declaration of Steven G. Gatley, all  
 14 pleadings and papers on file herein, all matters of which this Court must or may take  
 15 judicial notice, and upon such other and further evidence and argument as the court  
 16 deems just and proper.

17  
 18 Dated: September 30, 2009

**LEWIS BRISBOIS BISGAARD & SMITH LLP**

20 By s/Steven G. Gatley  
 21 Attorneys for Defendant  
 22 Protection One Alarm Monitoring, Inc.  
 23 E-Mail: gatley@lbbslaw.com

1                   **MEMORANDUM OF POINTS AND AUTHORITIES**

2           **I. INTRODUCTION**

3           Plaintiff Richard Clemens was employed by defendant Protection One, a  
 4 residential and commercial security system provider, as a residential sales manager.  
 5 Plaintiff was employed by Protection One from approximately March 7, 2005, until  
 6 his termination on August 28, 2007.

7           In his FAC, Plaintiff alleges two causes of action against Protection One for  
 8 (1) Violation of Federal and State Family and Medical Leave Act(s); and (2)  
 9 Unlawful Retaliation Against a Whistleblower.

10          As discussed in further detail below, Plaintiff's second claim for relief lacks  
 11 the necessary facts sufficient to state a cause of action. Furthermore, Plaintiff's  
 12 requests for punitive damages are supported merely by conclusory statements that  
 13 Protection One's conduct was "willful, reckless, oppressive, fraudulent and  
 14 malicious." No additional facts are set forth supporting Plaintiff's claims for  
 15 punitive damages.

16          Plaintiff's FAC is riddled with incurable defects. As such, Protection One  
 17 respectfully requests that the Second Claim for Relief in Plaintiff's FAC be  
 18 dismissed with prejudice, and that Plaintiff's requests for punitive damages be  
 19 stricken from the FAC without leave to amend.

20           **II. STANDARDS FOR RULING ON A MOTION TO DISMISS**

21          Federal Rules of Civil Procedure, Rule 12(b)(6) is similar to the common law  
 22 general demurrer, i.e., it tests the legal sufficiency of the claim or claims stated in the  
 23 complaint. The sole issue raised by a Rule 12(b)(6) motion is whether the facts  
 24 pleaded, would, if established, support a valid claim for relief. *Bell v. Hood*, 327  
 25 U.S. 678, 682-683 (U.S. 1946). The court need not accept as true conclusory  
 26 allegations or legal characterizations. Nor need it accept unreasonable inferences or  
 27 unwarranted deductions of fact. *Transphase Sys., Inc. v. S. Cal. Edison Co.*, 839 F.  
 28 Supp. 711, 718. (C.D. Cal. 1993); *Beliveau v. Caras*, 873 F. Supp. 1393, 1395-1396

1 (C.D. Cal. 1995). As such, dismissal under Rule 12(b)(6) for failure to state a claim  
 2 is proper where it is clear that no relief could be granted under any set of facts that  
 3 could be proved consistent with the allegations. *Cervantes. v. City of San Diego*, 5  
 4 F.3d 1273, 1274 (9th Cir. 1993) . A Rule 12(b)(6) motion is also appropriate where  
 5 an affirmative defense or other bar to relief is apparent from the face of the  
 6 complaint. *Groten v. California*, 251 F3d 844, 851 (9th Cir. 2001).

7 Although a request for punitive damages is not an independent cause of action,  
 8 it is not excluded by Rule 12(b)(6). “[T]he language of 12(b)(6) does not prohibit an  
 9 analysis of punitive damages. Rule 12(b)(6) provides that dismissal is proper ‘for  
 10 failure to state a claim upon which relief can be granted.’” *K.E.K. ex rel. Kauffman*  
 11 *v. The Grier School*, No. Civ. 1:CV-05-0386, 2005 WL 2028700, at \*3 (M.D. Pa.  
 12 July 25, 2005).

13 In *Parker v. Fidelity Security Life Ins. Co.*, No. CIV F 06-654 AWI DLB, 2006  
 14 WL 1456063 (E.D. Cal. 2006), the plaintiff brought suit against the defendant for  
 15 denial of benefits under her late husband’s life insurance policy. The complaint  
 16 brought a request for punitive damages on the grounds that the defendant insurer  
 17 refused to investigate the plaintiff’s loss by “ignoring” the medical records provided  
 18 to it by the plaintiff. The Court granted the defendant’s motion to dismiss punitive  
 19 damages claim brought under Rule 12(b)(6), as it found that the complaint failed to  
 20 provide specific allegations of malice, fraud, or oppression. While the court  
 21 acknowledged that “minute detail” was not required by Rule 8, it concluded that the  
 22 plaintiff had not provided sufficient facts to support her request.

23 Furthermore, under FRCP, Rule 12(f), a party may move to strike any,  
 24 “redundant, immaterial, impertinent or scandalous matter.” “A motion to strike is  
 25 appropriate to address requested relief, such as punitive damages, which is not  
 26 recoverable as a matter of law.” *Wilkerson v. Butler*, 229 F.R.D. 166, 170 (E.D. Cal.  
 27 2005).

1     **III. SECOND CAUSE OF ACTION FOR UNLAWFUL RETALIATION**  
 2     **AGAINST A WHISTLEBLOWER: PLAINTIFF FAILS TO STATE A**  
 3     **CLAIM UPON WHICH RELIEF CAN BE GRANTED.**

4     Plaintiff's second cause of action for unlawful retaliation against a  
 5     whistleblower pursuant to California *Labor Code* § 1102.5 completely fails to allege  
 6     the necessary elements for this cause of action.

7       *Labor Code* § 1102.5 makes it an unlawful employment practice for an  
 8     employer to (a) "make, adopt, or enforce any rule, regulation, or policy preventing an  
 9     employee from disclosing information to a government or law enforcement agency,  
 10    where the employee has reasonable cause to believe that the information discloses a  
 11    violation of state or federal statute, or a violation or noncompliance with a state or  
 12    federal rule or regulation," or (b) "to retaliate against an employee for disclosing  
 13    information to a government or law enforcement agency," amongst other  
 14    inapplicable portions of the statute.

15      **A. Objection to Alleged Use of Inferior Products.**

16      In his FAC, Plaintiff alleges that he "objected to Protection One's practice of  
 17    substituting an inferior product in the place of the one that had initially been  
 18    presented to the consumer," (see FAC at p. 7, ¶ 32, lines 5-7), that he "raised these  
 19    concerns with Protection One management," (see FAC at p. 5, ¶ 22, line 18), and that  
 20    he was terminated based upon this objection (see FAC at p. 8, ¶ 34, lines 10-11).

21      With regard to this attempted basis of liability, Plaintiff completely fails to  
 22    allege that Protection One made, adopted, or enforced any rule, regulation or policy  
 23    preventing him from disclosing this information to a government or law enforcement  
 24    agency. Plaintiff also fails to allege that he actually disclosed this information to a  
 25    government or law enforcement agency. Indeed, Plaintiff attempts to bypass the  
 26    most important elements to a cause of action under *Labor Code* § 1102.5 - that he  
 27    was prevented from disclosing information or that he disclosed information and was  
 28    terminated for doing so. Accordingly, Plaintiff's cause of action with respect to his

1 objection to the alleged use of inferior products must fail because he has not pled the  
 2 necessary elements.

3       **B. Support and Concern for Co-Worker's Alleged Sexual Harassment.**

4       Within the same cause of action, Plaintiff also alleges that he "raised and  
 5 supported the concern of a co-worker regarding alleged sexual harassment." (See  
 6 FAC at p. 7, ¶ 33, lines 8-9). Plaintiff, however, makes no other allegations  
 7 regarding this "support and concern" but to state that he was terminated by  
 8 Protection One for his "support and advocacy on behalf of the co-worker." (See  
 9 FAC at p. 8, ¶ 37, lines 10-13).

10      Similar to Plaintiff's objection to the alleged use of inferior products, Plaintiff  
 11 fails to allege that Protection One prevented him from disclosing information about  
 12 the alleged sexual harassment to any government or law enforcement agency; or that  
 13 he actually reported the alleged sexual harassment to a government or law  
 14 enforcement agency. Again, these are fundamental elements of this cause of action,  
 15 and Plaintiff's failure to allege such facts is absolutely detrimental to his claim.  
 16 Therefore, Plaintiff's cause of action with respect to his alleged "support and  
 17 concern" of a co-worker being sexually harassed must also fail because he has not  
 18 pled the necessary elements.

19       **IV. PLAINTIFF FAILS TO PROVIDE ANY SPECIFIC FACTS**  
 20       **DEMONSTRATING THAT PUNITIVE DAMAGES ARE**  
 21       **WARRANTED.**

22      Punitive damages are generally disfavored and should be granted with the  
 23 greatest caution. *Beck v. State Farm Mut. Auto Ins. Co.*, 54 Cal.App.3d 347, 355  
 24 (Cal. 1976). A plaintiff seeking punitive damages must plead and prove, by clear  
 25 and convincing evidence, that the defendant breached an obligation not arising from  
 26 contract, and that "the defendant has been guilty of oppression, fraud, or malice..."  
 27 California Civil Code §3294(a). "Punitive damages are appropriate if the  
 28 defendant's acts are reprehensible, fraudulent or in blatant violation of law or policy.

1 The mere carelessness or ignorance of the defendant does not justify the imposition  
 2 of punitive damages.” *Flyer’s Body Shop Profit Sharing Plan v. Ticor Title Ins. Co.*,  
 3 185 Cal.App.3d 1149, 1154 (Cal. 1986).

4 Whichever theory a plaintiff elects to pursue (oppression, fraud, or malice), he  
 5 must plead and prove by clear and convincing evidence that the defendant’s acts  
 6 were performed with the intention of depriving the plaintiff of “property or legal  
 7 rights or otherwise causing injury.” California *Civil Code* § 3294(c)(3). The phrase  
 8 “conscious disregard” is used to “describe the highly culpable state of mind which  
 9 justifies an exemplary award.” *G.D. Searle & Co. v. Superior Court*, 49 Cal.App.3d  
 10 22, 32 (Cal. 1975). A complaint which fails to allege that the defendant acted with  
 11 this state of mind, **in specific terms**, is insufficient to support a request for punitive  
 12 damages. *Id.* at 32-33 [conclusory allegations of wrongful, knowing, and willful  
 13 conduct are not enough; complaint must allege intent to injure plaintiff, or conscious  
 14 disregard of plaintiff’s rights].

15 Merely characterizing a defendant’s conduct as “oppressive,” “malicious” or  
 16 “wanton” is insufficient to meet the pleading burden. **Specific facts** must be alleged  
 17 to show that the defendant acted with the requisite malice, oppression, or fraud. *Appl*  
 18 *v. Lee Swett Livestock Co.*, 192 Cal.App.3d 466, 470 (Cal. 1987). Conclusory  
 19 characterizations, unsupported by specific factual allegations of malice, oppression,  
 20 or fraud are insufficient. *Brousseau v. Jarrett*, 73 Cal.App.3d 864, 872 (Cal. 1977).  
 21 Where the injury complained of is not deliberately inflicted by the defendant, a  
 22 plaintiff seeking to recover punitive damages must prove that the defendant acted  
 23 with a conscious disregard of the plaintiff’s safety. *O’Hara v. Western Seven Trees*  
 24 *Corp. Intercoast Management*, 75 Cal.App.3d 798 (Cal. 1977).

25 The FAC fails to comply with the foregoing, as Plaintiff has not set forth *any*  
 26 basis for his requests for exemplary damages. There are no specific facts to  
 27 demonstrate that Protection One’s conduct was in any manner oppressive, fraudulent,  
 28 or malicious; only mere conclusory allegations. Under the circumstances, Plaintiff’s

1 request for exemplary damages should be dismissed and stricken from the FAC.

2       **A. Plaintiff Fails to Allege Punitive Damages Under the Corporate**  
 3       **Standard.**

4       Defendant Protection One is a corporation. Plaintiff's prayer for relief fails to  
 5       allege punitive damages under the corporate employer standard. As a corporation,  
 6       Protection One lacks the mind ordinarily capable of intent to injure or deceive.  
 7       Accordingly, Protection One can only become vulnerable to a claim for punitive  
 8       damages where its employees acted with the requisite mal intent. California *Civil*  
 9       *Code* 3294(b); *Cruz v. HomeBase* 83 Cal.App.4th 160 (Cal. 2000).

10      For an employer to be held liable for an employee's tort under the doctrine of  
 11     respondeat superior, it is not responsible for punitive damages where it neither  
 12     directed nor ratified the act. *Ebaugh v. Rabkin*, 22 Cal.App.3d 891, 895 (Cal. 1972).  
 13      For purposes of determining an employer's liability for punitive damages, ratification  
 14     generally occurs where, under the particular circumstances, the employer  
 15     demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious  
 16     behavior by an employee in the performance of his job duties. Corporate ratification  
 17     in the punitive damages context requires actual knowledge of the conduct and its  
 18     outrageous nature. *College Hospital v. Superior Court*, 8 Cal.4th 704, 726 (Cal.  
 19     1994)

20      Plaintiff has failed to allege any facts that Protection One directed, authorized  
 21     or subsequently ratified any alleged malicious conduct by its employees, with  
 22     knowledge as to the malicious quality of such alleged act or conduct. Therefore,  
 23     Plaintiff's conclusory allegations are insufficient to support his claim for punitive  
 24     and exemplary damages against Protection One.

25     ///

26     ///

27     ///

28     ///

## **CONCLUSION**

For the reasons set forth above, Protection One respectfully requests that Plaintiff's Second Claim for Relief be dismissed with prejudice, and that Plaintiff's requests for punitive damages be stricken from the FAC without leave to amend.

Dated: September 30, 2009

LEWIS BRISBOIS BISGAARD & SMITH LLP

By s/Steven G. Gatley

Attorneys for Defendant

**Attorneys for Defendant  
Protection One Alarm Monitoring, Inc.**

E-Mail: gatley@lbbslaw.com

## **DECLARATION OF STEVEN G. GATLEY**

I, Steven G. Gatley, declare:

1. I am an attorney duly licensed to practice in all of the courts of the State of California and am a member of Lewis Brisbois Bisgaard & Smith LLP, attorneys of record for Defendant Protection One Alarm Monitoring, Inc. herein. The facts set forth herein are of my own personal knowledge and if sworn I could and would testify competently thereto.

2. I submit this declaration in support of Defendant Protection One Alarm Monitoring, Inc.'s Motion to Dismiss Plaintiff's First Amended Complaint.

3. On or about September 10, 2009, Plaintiff Richard Clemens filed a First Amended Complaint in the U.S. District Court, Southern District of California, Case No. 09 CV 1424LCAB. A true and correct copy of this document is attached as Exhibit A and is incorporated by reference.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Declaration was executed on September 30, 2009, at Los Angeles, California.

s/Steven G. Gatley

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**EXHIBIT “A”**

1 Law Offices of John H. Carmichael  
 2 John H. Carmichael, Esq. (196416)  
 3 269 South Beverly Drive, Suite 395  
 4 Beverly Hills, California 90212  
 Telephone: (310) 345-2525  
*Attorney for Plaintiff,*  
 Richard S. Clemens

5  
 6  
 7  
**UNITED STATES DISTRICT COURT**

8  
**FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

9  
 10 RICHARD S. CLEMENS, *an*  
 individual,

11 Plaintiff,

12 *v.*

13 PROTECTION ONE ALARM  
 14 MONITORING, INC., *a corporation*,  
 15 and Does 1-10, inclusive,

16 Defendants.

17 The Honorable M. James Lorenz  
 Case. No. 09-cv-01424-L-CAB

18 **FIRST AMENDED COMPLAINT FOR:**

1. **VIOLATION OF FEDERAL AND STATE FAMILY AND MEDICAL LEAVE ACT(S) AND WRONGFUL TERMINATION BASED UPON TAKING LEAVE**
2. **UNLAWFUL RETALIATION AGAINST A WHISTLEBLOWER; WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY**

19 **DEMAND FOR JURY TRIAL**

20 Plaintiff complains as follows:

21 1. This matter generally concerns employment law claims by Plaintiff  
 22 Richard S. Clemens ("Clemens") against his former employer, Protection One  
 23 Alarm Monitoring, Inc. ("Protection One").

24 2. This Court has subject-matter jurisdiction over this matter pursuant to  
 25 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1337 (supplemental  
 jurisdiction over state-law claims).

26 3. This Court may assert personal jurisdiction over Defendants because  
 27 Defendant Protection One maintains a place of business in this District at which

Plaintiff was employed.

4. This Court is a proper venue for this matter because Defendant Protection One and its relevant records may be found in this District, and substantial events relevant to the causes of action alleged in this Complaint occurred in this District.

## **PARTIES AND PERSONS**

5. Plaintiff Clemens is a United States citizen and a natural person who now resides, and at all relevant times resided, in the State of California.

6. Defendant Protection One is a business entity that, at all relevant times, maintained a place of business at 9596 Chesapeake Drive, Suite A, San Diego, California, 92123.

7. Does 1-10 are persons or entities whose identity is not known to Clemens on this date who materially participated in, assisted in, and/or conspired to cause harm to Clemens through the conduct complained of in this action.

## **FACTS COMMON TO ALL CLAIMS FOR RELIEF**

8. Protection One is a leading provider of home and business security systems in the United States. The company sells security systems, security products, installations, and service and maintenance and monitoring related to those security systems and products.

9. Richard Clemens was employed at Protection One at its office in this District from on or about March 7, 2005 to on or about August 28, 2007. He was employed in a position known as "Residential Sales Manager" by Protection One. Clemens was responsible for the training and performance of a group of field sales personnel. In fact, when Clemens' wife took ill, as described more fully below, Clemens continued to put in a full work-week and was chastised for not keeping up with the schedule generally demanded of him by Protection One. Even during the initial onset of Clemens' wife's illness, and prior to requesting

1 leave, Clemens continued to put in a minimum of 40 hours a week, but was not  
2 able necessarily to work all of his hours from dawn until dusk every day as he  
3 had done earlier. This was not acceptable to Protection One, and eventually  
4 Clemens requested a leave of absence to deal with his wife's illness.

5 10. Shortly thereafter, Lori Suchey ("Suchey"), a new Human Resources  
6 manager, started unreasonably questioning the basis for the granted leave. For  
7 example, Suchey asked Clemens to obtain information from his doctor regarding  
8 what the doctor interpreted a "month" to mean as applied to the granted leave.  
9 Suchey stated she might exercise the right to demand that Clemens' wife see  
10 another doctor if Clemens did not comply. Clemens complied. A representative  
11 from Protection One even contacted Clemens' wife's physician directly in an  
12 improper attempt to gain private medical information for its own advantage and  
13 purposes. Shortly upon his return from intermittent leave, Protection One  
14 terminated Clemens.

15 11. One of the primary, transparent and most disturbing pretexts offered  
16 by Protection One was to claim that Clemens was not "in on time" during the  
17 period of his wife's illness when, in fact, he was entitled to such flexibility while  
18 on intermittent leave.

19 12. Clemens' employment at Protection One terminated on or about  
20 August 28, 2007.

21 13. On or about April 9, 2008, Clemens filed with the Equal Employment  
22 Opportunity Commission (EEOC) and the California Department of Fair  
23 Employment and Housing (DFEH) a complaint charging Protection One with  
24 wrongful termination in violation of the California Fair Employment and Housing  
25 Act (FEHA) for joint consideration by DFEH and EEOC of the common set of  
26 operative facts giving rise to the respective statutory claims. On October 21,  
27 2008, DFEH, for itself and on behalf of the EEOC, issued to plaintiff a right-to-  
28 sue letter.

## Leah's Illness

14. Leah Clemens, Richard's spouse, began suffering from difficult-to-diagnose health problems including a chronically racing heart, high blood pressure, related cardiovascular symptoms, sleep disturbances, and resulting severe anxiety.

15. During the two-plus years of his employment, Clemens was one of the highest-producing “Residential Sales Managers” not just for this local branch office of Protection One, but in the context of its national operations as well. Clemens continued to work long hours for Protection One.

16. However, as a result of Leah's illness, Clemens was required to be home at certain times to provide general support and care.

## **Protection One's Discriminatory Reaction to Clemens' Leave of Absence**

17. When Clemens began his intermittent leave of absence (all the while maintaining appropriate contact with the company), Cerino and Suchey attempted to intimidate Clemens into waiving his right to take family leave under both federal and California law providing for leave to care for one's spouse by:

(a) Discouraging Clemens from fully participating in the leave program and unreasonably requesting additional information from Clemens and his physician to justify the already-approved leave;

(b) Improperly seeking confidential information about Clemens' wife's medical condition and suggesting to Clemens that Protection One might demand she seek alternate care;

(c) Suddenly attempting to "enforce" alleged company "rules" regarding Clemens' working hours that had not been previously enforced in general and, on information and belief, were not enforced against other similarly situated employees. Such alleged "rules" were generally inconsistent with other regulations promulgated by Protection One.

18. Despite the hostile reaction by Protection One management, Clemens

1 continued to work throughout this period of intermittent leave, frequently  
2 conferring with and providing guidance to other salespersons well into the  
3 evening and on weekends.

4 19. Cerino specifically discouraged the leave request asserting that taking  
5 family leave would harm Clemens' career.

6 20. During his "leave" Clemens continued to have substantial contact with  
7 and effect on his sales team from home.

8 Termination in Violation of Public Policy

9 21. Clemens had taken steps to make management at Protection One  
10 aware of sexual harassment of a coworker. This co-worker complained of  
11 Defendant Cerino "leering" at her and inappropriately "looking her up and down,  
12 head to toe." Clemens informed Cerino that the co-worker had these impressions  
13 and Cerino's response to Clemens was to tell him to "Make it go away." Clemens  
14 took no further action on the matter, and neither did Protection One.

15 22. Further, while on leave, Clemens had specifically objected to the  
16 entrenched practice of Protection One's substitution of lesser quality products  
17 actually installed for those presented to the customer during the sales call.  
18 Clemens raised these concerns with Protection One management and Protection  
19 One took no action to correct or modify this fraudulent practice. Such assertions  
20 by Clemens could subject Protection One to regulatory action by various State  
21 and Federal agencies, and this fact was known to Protection One at the time of  
22 Clemens' reporting.

23 23. Thereafter, and during Clemens' intermittent "leave," he was presented  
24 with a series of purported "Corrective Action Notices" providing a pretext to  
25 terminate him.

26 24. Clemens was terminated by Protection One on or about August 28,  
27 2007. The reasons stated for terminating Clemens were in fact false and merely  
28 pretextual. The true rationale for terminating Clemens was one or more of:

- (a) Clemens' use of family leave as allowed by law;
  - (b) Retaliation against Clemens for supporting another worker's sexual harassment claim; and
  - (c) Retaliation against Clemens for objecting to and reporting an unfair business practice by Protection One.

## **CLAIMS FOR RELIEF**

**FIRST CLAIM FOR VIOLATION OF FEDERAL AND STATE STATUTORY  
FAMILY AND MEDICAL LEAVE PROTECTIONS**

(By Richard Clemens Against All Defendants)  
[29 U.S.C. § 2601 *et seq.*; Cal. Gov. Code §§ 12945.1, 12945.2]

25. Paragraphs 1-24 are realleged as if fully set forth at this point.

26. At all times relevant herein, Protection One employed more than 50 persons within a 75 mile radius of the events complained of by Clemens.

27. The conduct complained of violates Clemens' rights under the Federal Family and Medical Leave Act, 29 U.S.C. § 2601 *et seq.*, and applicable sections of the California Family Rights Act, and Clemens is therefore entitled to remedies prescribed in those Acts, including without limitation general damages attributable to the conduct of corporate and individual defendants and other damages as provided under the Acts.

28. The conduct complained of violates Clemens' rights under the California Fair Employment and Housing Act, Cal. Gov. Code §§ 12945.1 and .2, and Clemens is therefore entitled to remedies prescribed in that Act, including without limitation general damages attributable to the conduct of corporate and individual defendants and other statutory remedies contained therein.

29. Defendants' conduct was willful, reckless, oppressive, fraudulent and malicious.

30. Clemens was damaged in an amount which shall be proved at the time of trial, at which time Clemens will seek punitive damages as allowed by law.

## **SECOND CLAIM FOR UNLAWFUL RETALIATION AGAINST A WHISTLEBLOWER**

(By Richard Clemens Against Protection One and DOES 4-7)  
[Cal. Labor Code § 1102.5]

31. Paragraphs 1-24 are realleged as if fully set forth at this point.

32. As described above, Clemens objected to Protection One's practice of substituting an inferior product in the place of the one that had initially been presented to the consumer.

33. Clemens raised and supported the concern of a co-worker regarding alleged sexual harassment.

34. Clemens was wrongfully terminated by Protection One, in part, based on his objection to the fraudulent practice described and his support and advocacy on behalf of the co-worker complaining of the alleged sexual harassment.

35. Defendants' conduct was willful, reckless, oppressive, fraudulent and malicious.

36. The conduct complained of violates Clemens' rights under Cal. Labor Code § 1102.5, and Clemens is therefore entitled to remedies prescribed in that law, including without limitation:

- (a) General damages attributable to the conduct of corporate and individual defendants;
  - (b) Punitive damages in accordance with proof at the time of trial;
  - (c) Attorney's fees and costs.

## **PRAYER FOR RELIEF**

**WHEREFORE, Plaintiff** Richard S. Clemens prays for judgment against Defendants as follows:

## On the First Claim

1. For general damages against Defendants, jointly and severally, in an amount to be established in accordance with proof at trial, together with interest

thereon at the legal rate; and

2. For front and/or back pay against Defendant Protection One, in an amount to be established in accordance with proof at trial, together with interest thereon at the legal rate; and
3. For punitive damages in accordance with proof at the time of trial; and
4. For attorney's fees and costs.

## On the Second Claim

1. For general damages against Defendants, jointly and severally, in an amount to be established in accordance with proof at trial, together with interest thereon at the legal rate; and

2. For front and/or back pay against Defendant Protection One, in an amount to be established in accordance with proof at trial, together with interest thereon at the legal rate; and

3. For punitive damages in accordance with proof at trial, together with interest thereon at the legal rate; and

**4. For attorney's fees and costs.**

**On All Claims**

- a. For costs of suit incurred;
  - b. For interest at the statutory rate;
  - c. For reasonable attorney's fees if allowed by law; and
  - d. For such other relief as this Court may deem just and proper.

Respectfully submitted this 10th day of September 2009,

/signed for CM/ECF, JHC/

John H. Carmichael  
Law Offices of John H. Carmichael  
Attorney for Plaintiff Richard S. Clemens

1  
**DEMAND FOR JURY TRIAL**

2 Plaintiff demands jury trial against each and every defendant on each and every  
3 cause of action complained of in this document.

4 /signed for CM/ECF, JHC/  
5  
6 John H. Carmichael  
7 Law Offices of John H. Carmichael  
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1                   **FEDERAL COURT CERTIFICATE OF SERVICE**

2                   *Richard Clemens v. Protection One, et al.*

3                   USDC Southern District - Edward J. Schwartz U.S. Courthouse

4                   (940 Front Street, San Diego, CA 92101-8900)

5                   Hon. M. James Lorenz - Courtroom 14<sup>th</sup>

6                   Client/Matter: 26026-51

7                   **STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

8                   At the time of service, I was over 18 years of age and not a party to the action.  
9                   My business address is 221 North Figueroa Street, Suite 1200, Los Angeles,  
10                  California 90012. I am employed in the office of a member of the bar of this Court  
11                  at whose direction the service was made.

12                  On **September 30, 2009**, I served the following document described as  
13                  **DEFENDANT PROTECTION ONE ALARM MONITORING, INC.'S**  
14                  **NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S FIRST**  
15                  **AMENDED COMPLAINT; MEMORANDUM OF POINTS AND**  
16                  **AUTHORITIES IN SUPPORT THEREOF; DECLARATION OF STEVEN G.**  
17                  **GATLEY** on the following interested party at the following addresses:

18                  *Attorneys for Plaintiff*

19                  Law Offices of John H. Carmichael

20                  John H. Carmichael, Esq.

21                  269 South Beverly Drive, Suite 395

22                  Beverly Hills, California 90212

23                  Telephone: (310) 345-2525

24                  Email: jhclaw@gmail.com

25                  **BY COURT'S CM/ECF SYSTEM**

26                  Pursuant to Local Rule, I electronically filed the documents with the Clerk of  
27                  the Court using the CM/ECF system, which sent notification of that filing to the  
28                  persons listed above.

29                  **FEDERAL**

30                  I declare that I am employed in the office of a member of the bar of this Court  
31                  at whose direction the service was made.

32                  Executed on **September 30, 2009**, at Los Angeles, California.

33                  

34                  Norma Chanes